

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 11, 2007 Session

**JOE ALLEN PENNINGTON v. SONYA RENE PENNINGTON**

**Appeal from the Circuit Court for Davidson County  
No. 04D-192 Carol Soloman, Judge**

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**No. M2007-00181-COA-R3-CV - Filed May 7, 2008**

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In response to the father's petition for modification of custody and the mother's counterpetition for modification of custody, the trial court found a material change in circumstances and made the father the primary residential parent. On appeal, the mother assigns error to several evidentiary rulings by the trial court, to the trial court's factual findings of abuse, and to the trial court's decision concerning custody. We find that the trial court erred in excluding testimony from the stepfather, the alleged abuser of the child, and reverse and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JON KERRY BLACKWOOD, SP.J., joined.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Sonya Rene Pennington.

Mary C. LaGrone, Nashville, Tennessee, for the appellee, Joe Allen Pennington.

**OPINION**

The parties, Joe Allen Pennington ("Father") and Sonya Rene Pennington Taylor ("Mother"), were divorced on the grounds of irreconcilable differences on July 27, 2004. At that time, the parties' only child, E.D.P., was three years old. Pursuant to the parenting plan agreed to by the parties and signed by the court, Mother and Father were to share equally in parenting time, with E.D.P. residing with his mother from January 1 through July 1 and with his father from July 1 through January 1 every year. The nonresidential parent had parenting time with E.D.P. two days a week.

On March 9, 2006, Father filed an emergency request for temporary removal of E.D.P. from Mother and a petition to modify custody. As the chief ground for the emergency removal and change of custody, Father alleged that E.D.P. had sustained "substantial and numerous injuries" while in Mother's care. Based upon Father's sworn petition and affidavit, the trial court ordered

emergency removal of E.D.P. from his mother's care pending further orders of the court.<sup>1</sup> On March 17, 2006, Mother filed a motion to dissolve the court's ex parte order removing the child from her custody. A few weeks later, she filed a counterpetition for modification of custody, alleging that Father was harming the child by attempting to alienate him from his mother.

A hearing was held on Mother's motion to dissolve the ex parte order on March 31, 2006, and the court heard testimony from both parties.<sup>2</sup> In an order entered on April 25, 2006, the court found that E.D.P. "was shown to have a black eye and more significant injury to the upper buttocks and lower back." The court further found that the cause of these injuries was "extremely unclear." The court dissolved the ex parte order and instructed the parties to follow the original parenting plan. E.D.P. was to remain in counseling. Out of caution and due to the child's report, the court also ordered that, pending further hearing, "Jason Taylor [Mother's then fiancé] shall be restrained from disciplining or caring for the minor child, [E.D.P.], in any manner and Jason Taylor shall be supervised at all times when in the presence of the parties' minor child."

On September 5, 2006, Father's attorney filed and provided to Mother's attorney a witness and exhibit list. As will be discussed more fully below, there is a factual dispute as to when and under what circumstances Mother's attorney informed Father's attorney of her witnesses and exhibits.

The hearing on the parties' petitions for modification began on September 11, 2006. Before calling any witnesses, Father objected to Mother's witnesses on the grounds that her attorney had not given Father's attorney timely notification in accordance with the local rules of court. The court ruled that Mother's witnesses would not be allowed to testify. Father called the following witnesses: Father, Mother, Father's wife, Father's parents, and Christy Murphy, a Pennington family friend who saw E.D.P. in January 2006. Mother testified on her own behalf. Mother's attorney then began making an offer of proof by taking the testimony of the excluded witnesses. The attorney questioned Stacey Edgison, the director of the daycare center attended by E.D.P., and then called another witness, Carol Taylor. At that point, Father's attorney objected on the grounds that witnesses had been going in and out of the courtroom and talking about the case. The court decided not to let any more witnesses testify and asked Mother's attorney to tell the court what the witnesses would say. Mother's attorney gave a summary of the other witnesses' testimony.

The court wanted to hear testimony from the child's psychologist before making its decision. The psychologist, Ms. Carlin Jyles, testified on September 12, 2006. Ms. Jyles testified about statements E.D.P. had made to her about being hit by Jason Taylor, now Mother's husband, and by his stepbrothers, the twin sons of Father's wife; she reported these disclosures to the Department of Children's Services (DCS) as required by law. Ms. Jyles testified that she had not yet been able to make a determination as to whether E.D.P. had been abused by his stepbrothers or his stepfather.

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<sup>1</sup> Although Father requested a show cause hearing, no such hearing was scheduled.

<sup>2</sup> The motion hearing was held before Judge Mark Fishburn, sitting by interchange.

She needed more time with E.D.P. before she could form an opinion as to the reliability of the reports.

The court made findings from the bench on September 13, 2006, and entered an order on September 25, 2006, finding that E.D.P. “has been physically abused by Mother’s husband, Jason Taylor, and the minor has been emotionally abused by Mother and Mother has failed to protect the minor child.”<sup>3</sup> The court, therefore, found that there was a material change of circumstance requiring modification of custody and made Father the primary residential parent. A permanent injunction was issued against Mother enjoining and restraining her “from allowing her husband Jason Taylor to be left with the minor child to supervise the child and/or to discipline the minor child in any physical manner or means whatsoever.”<sup>4</sup> Mother’s petition for modification was dismissed.

Mother filed two motions to alter or amend in October 2006 stating various grounds for relief from the judgment, including the evidentiary issues raised on appeal. Jason Taylor filed a motion to intervene. These matters were heard on December 15, 2006. Mr. Taylor’s motion to intervene was denied. Apart from two alterations to the final order—making the injunction against Mother, not against Mr. Taylor directly, and clarifying the summer parenting schedule—the court denied Mother’s motion to alter or amend. An amended final order was entered on January 22, 2007.

On appeal, Mother argues that the trial court erred in excluding the testimony of her witnesses based on a violation of the local rules. Mother further asserts that the court erred in admitting the child’s hearsay statements concerning abuse by his stepfather, in finding that the child was abused by Mr. Taylor, and in awarding primary custody to Father and dismissing Mother’s counterpetition requesting primary custody. We have concluded that the trial court abused its discretion in excluding the testimony of Mr. Taylor.

## **Analysis**

### **Exclusion of testimony**

The trial court excluded the testimony of all of Mother’s witnesses on the grounds that Mother failed to comply with 20<sup>th</sup> Dist. Local R. 29.01, which states, in pertinent part:

At least seventy-two (72) hours (excluding weekends and holidays) before the trial of a case, opposing counsel shall either meet face-to-face or shall hold a telephone conference for the following purposes:

a. to exchange names of witnesses, including addresses and home and business telephone numbers . . . including anticipated impeachment or rebuttal witness; and

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<sup>3</sup>The court found that Mother was not a credible witness.

<sup>4</sup>The original version of the order included an injunction against Mr. Taylor; this was deleted after a hearing on Mother’s motion to alter or amend.

- b. to make available for viewing and to discuss proposed exhibits.

Mother objects to the exclusion of the testimony of her witnesses, particularly Jason Taylor, Stacey Edgison, and Mr. Whipple, a DCS caseworker.

Trial courts have broad discretion with respect to the admission or exclusion of evidence and the enforcement of local rules. *Hill v. Hill*, No. M2006-01792-COA-R3-CV, 2008 WL 110101, \*4 (Tenn. Ct. App. Jan. 9, 2008) (Tenn. R. App. P. 11 filed Mar. 10, 2008); *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983). An appellate court will find an abuse of discretion “only when the trial court applies an incorrect legal standard, reaches an illogical decision, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *Francois v. Willis*, 205 S.W.3d 915, 916 (Tenn. Ct. App. 2006).

In *Strickland v. Strickland*, 618 S.W.2d 496, 499 (Tenn. Ct. App. 1981), the court was asked to review the propriety of a trial judge’s decision to exclude the testimony of a detective. During the wife’s deposition, she intentionally failed to name the detective when asked to identify persons with information about the divorce suit, thereby violating Tenn. R. Civ. P. 26.02(1). *Strickland*, 618 S.W.2d at 499. The Court of Appeals looked to the inherent power of the trial judge to sanction a violation of the rule. *Id.* at 501. While *Strickland* involved a rule of civil procedure and the present case involves a local rule, we consider the court’s analysis in *Strickland* instructive. The court stated:

Generally, where a party has not given the name of a person with knowledge of discoverable matter, the court should consider the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance. In the light of these considerations, the court may permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may take the deposition of the witness or otherwise prepare to meet the testimony.

*Id.* In finding that the trial judge did not abuse his discretion in excluding the testimony, the court also noted that the exclusion did not result in any prejudice to anyone since many of the results of the detective’s investigation had been admitted in the form of photographs. *Id.*

How do the *Strickland* factors apply in the present case? The first factor is the explanation given by Mother and her attorney for the failure to disclose the witness information in a timely fashion. At the hearing, the parties’ attorneys disagreed on the exact sequence of events. It is undisputed that Father’s attorney filed and gave Mother’s attorney a witness list on September 5, 2006. Pursuant to the 72-hour requirement of the local rule, witness information for a hearing at 9:00 a.m. on Monday, September 11, 2006, should have been exchanged by 9:00 a.m. on Wednesday, September 6, 2006. According to Father’s attorney, she received an e-mail from Mother’s attorney on September 7, 2006 with an unsigned and incomplete witness list; the attorneys arranged to talk by telephone that afternoon, when Father’s attorney asked Mother’s attorney for missing witness contact information. Father’s attorney asserts that Mother’s attorney did not provide her with a complete and signed witness list until after 10:00 a.m. on September 8, 2006.

While Mother's attorney did not deny that she was late in getting a complete witness list to Father's attorney, she argued that she made good faith efforts to comply with the local rule. Mother's attorney told the court that she had e-mailed Father's attorney's office the week before the witness information was due to get a time and date when they could meet. According to Mother's attorney, the reply e-mail stated that Father's attorney would not be able to meet until after Tuesday, September 5, 2006. On Wednesday, September 6, 2006, after receiving Father's witness list, Mother's attorney sent over a list of witnesses. Mother's attorney stated that, on September 7, 2006, she had the telephone numbers for Mr. Whipple and Ms. Edgison. Her secretary mistakenly sent a version of the witness list without the additional contact information; Mother's attorney attempted to fax the updated list from her home after 4:30 Thursday afternoon, but the fax did not go through. She then e-mailed a copy to Father's attorney. On September 8, 2006, she faxed the complete witness list to Father's attorney's office.

Father emphasizes that Mother's attorney never produced a copy of the e-mail she claims to have sent to Father's attorney prior to the time when the local rule required the exchange of witness information. Nevertheless, Mother's attorney informed the court of her version of the events. The trial judge was, therefore, presented with some explanation for Mother's failure to present a witness list to Father in a timely manner. The local rule contemplates a face-to-face meeting or a telephone conference to exchange witness information, and Mother's attorney purportedly made some attempt to arrange such a meeting prior to the deadline.

The next factor to be considered is the importance of the witness's testimony. In deciding to exclude Mother's witnesses, the trial judge heard the attorneys' accounts of the attorneys' communications prior to the hearing. There is no indication in the record that the court considered the importance of the excluded testimony. It is likely that the testimony of Jason Taylor would have played a central role in the case since he is the person alleged to have physically abused the child. The offer of proof as to Mr. Taylor's testimony indicates that he would have testified about his whereabouts during the times of the alleged abuse as well as about his relationship with E.D.P.. Ms. Edgison, the day care director, testified about the absence of any reported incidents of injuries to E.D.P.. There was no offer of proof concerning Mr. Whipple, the DCS worker.

The third factor is the need for time to prepare to meet the witness's testimony. This issue was not mentioned at the September 2006 hearing but was brought up by one of Mother's attorneys at the December 2006 hearing on her motions to alter or amend. Father had previously taken Mr. Taylor's deposition, and Mr. Taylor was on Father's witness list. He was not a surprise witness. Little if any time would have been required for Father to prepare for Mr. Taylor's testimony. Father's attorney was notified by Mother's attorney within the deadline of the local rule of Mother's intention to call Mr. Taylor as a witness. Mr. Taylor's testimony was excluded because Father was not provided with Mr. Taylor's contact information. As pointed out by Mother, however, Father knew that Mr. Taylor was now Mother's husband and lived with her; with that information, Father knew how to contact Mr. Taylor. Father also would have known how to contact the day care director as he transported the child to or from day care at times.

The fourth factor is the possibility of a continuance. After the first day of the hearing, the trial judge continued the case in order to obtain the testimony of the child's counselor. There is nothing in the record to indicate that, if Father had needed additional time to prepare for the excluded witnesses, the court could not have allowed for a continuance.

We have concluded that the trial court abused its discretion in excluding the testimony of Mr. Taylor by failing to consider all relevant factors, not just the attorney's explanation, thereby reaching an overly harsh result. In particular, the trial court failed to consider the importance of Mr. Taylor's testimony and the lack of prejudice to the opposing party in allowing him to testify.<sup>5</sup> Moreover, in child custody matters, the welfare of the child is the paramount concern, and the rights of the parties must yield to that concern. *Dantzler*, 665 S.W.2d at 387. In light of the importance of Mr. Taylor's testimony, its exclusion may well have affected the outcome of the case.

We are not convinced that the exclusion of the testimony of the other witnesses constituted an abuse of discretion. Unlike Mr. Taylor, Ms. Edgison and Mr. Whipple were not on Father's witness list and were not deposed. There was no offer of proof for Mr. Whipple, and Ms. Edgison's excluded testimony only established that she did not observe or know of any injuries to E.D.P.. Moreover, error in the exclusion of evidence "does not require reversal unless we can determine the evidence would have affected the outcome of the trial had it been admitted." *Hill*, 2008 WL 110101, at \*5.<sup>6</sup> We cannot say, based upon the record before us, that the testimony of these other witnesses was likely to affect the outcome of the case.

### Hearsay

Mother further argues that the trial court erred in admitting the hearsay statements of E.D.P. that Jason Taylor hit him. The following witnesses testified that E.D.P. had made such a statement to them: Father; Larry Pennington, paternal grandfather; Christy Murphy, a Pennington family friend; Deanna Pennington, Father's wife; and Carlin Jyles, psychologist.<sup>7</sup>

We review a trial court's decisions regarding the admission or exclusion of evidence under the abuse of discretion standard. *Danny L. Davis Contractors, Inc. v. Hobbs*, 157 S.W.3d 414, 418-19 (Tenn. Ct. App. 2004).

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<sup>5</sup>*Brandy Hills Estates, LLC v. Reeves*, No. M2004-02682-COA-R3-CV, 2006 WL 3730808 (Tenn. Ct. App. Dec. 15, 2006), cited by Father, affirmed a trial court's exclusion of two witnesses not timely included on the defendants' witness list in accordance with a local rule and a scheduling order. The litigation had been going on for almost three years, and the trial judge found it "a bit strange" that these witnesses had been discovered at such a late date. *Reeves*, 2006 WL 3730808, at \*5. We do not find the situation in *Reeves* analogous to the facts in the present case.

<sup>6</sup>This is consistent with Tenn. R. Evid. 103(a), which states: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

<sup>7</sup>Mother did not object at trial to Ms. Jyles's testimony as to E.D.P.'s statements of abuse. In accordance with Tenn. R. Evid. 103(a), a finding of error generally will not be predicated on the admission of evidence to which no timely objection was made at trial.

Tenn. R. Evid. 803(25) states the relevant exception to the hearsay rule:  
*Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect . . . , issues concerning severe child abuse . . . , or issues concerning determination of parental rights . . . , and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation.*

As emphasized by Mother, Tenn. R. Evid. 803(25) allows such statements to be admitted only if the circumstances indicate trustworthiness. The Advisory Commission Comments to Tenn. R. Evid. 803(25) state that, in determining the trustworthiness of such statements, the trial court should consider the motivation of the child declarant, the motivation of some adults to influence a child, and the presence or absence of corroborating evidence.

In questioning the trustworthiness of E.D.P.'s statements, Mother points to the April 25, 2006 order dissolving the ex parte order on the basis that the judge could not reach any conclusion as to who or what caused E.D.P.'s injuries. Since that March 31, 2006 hearing was only a preliminary determination as to whether the ex parte order should remain in effect pending a final hearing, the judge's decision does not indicate a lack of trustworthiness as to the allegations of abuse. Likewise, the counselor, Ms. Jyles, testified that she was unable as yet to come to a definitive opinion as to whether and how E.D.P. had been abused because she needed more time with E.D.P.. Mother also argues that E.D.P.'s statements are contradictory and that there were reasonable explanations for his injuries. While Ms. Jyles acknowledged that some of E.D.P.'s statements were "fantastical," there is also evidence from the relevant time period consistent with his statements of abuse, including clingy behavior, being subdued and quiet after time at Mother's house, taking off his clothes and hiding when it was time to go back to Mother's house, behavior problems after being at Mother's house, and acting like a robot or shutting down when asked about the incidents of abuse by the counselor. While it could be argued that Father and his family members might have a motive for influencing E.D.P.'s statements, there is no evidence that they attempted to do so. Moreover, E.D.P. made similar statements to Christy Murphy, an unfamiliar adult who asked about his injuries at a party, and to Ms. Jyles. There is no evidence suggesting that E.D.P. was motivated to invent stories of abuse. The trial court found Father to be a credible witness and gave great weight to Ms. Jyles's testimony.

Based upon the record and the factors set out in the Advisory Committee Comments to Tenn. R. Evid. 803(25), we think that the trial court acted within its discretion in admitting E.D.P.'s statements.

Because we have concluded that the trial court erred in excluding Mr. Taylor's testimony, we reverse the judgment of the trial court and remand for further proceedings. Costs of the appeal are assessed against the appellee, Joe Allen Pennington, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE